Supreme Court, U.S.
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No. 06-06156

In The

Supreme Court of the United States

JOHN VONDERHAAR HALTOM,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Utah

PETITION FOR WRIT OF CERTIORARI

W. ANDREW MCCULLOUGH, L.L.C.
Counsel of Record
6885 South State Street Suite 200
Midvale, Utah 84047
Telephone: (801) 565-0894

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the Utah Supreme Court err in ruling that a finding of simple negligence, rather than the usual standard of criminal negligence, was sufficient for conviction of the crime of dealing in materials harmful to a minor, a felony, in light of the First Amendment, and this Court's decisions in *Staples v. United States*, 511 U.S. 600 (1994) and *United States v. X-Citement Video*, 513 U.S. 64 (1994)?

LIST OF ALL PARTIES

Plaintiff and Respondent: State of Utah

Defendant and Petitioner: John Vonderhaar Haltom

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The opinion of the Utah Supreme Court, on certiorari to the Utah Court of Appeals, in *State v. Haltom*, is at 2007 UT 22, 572 Utah Adv. Rep. 3 (Utah 2007). The opinion of the Utah Court of Appeals affirming Petitioner's conviction was published as *State v. Haltom*, 2005 UT App 348, 121 P.3d 42 (Utah App. 2005).

STATEMENT OF JURISDICTION

The decision of the Utah Supreme court was entered on February 23, 2007. It is not yet published in the Pacific Reporter. The official Utah citation is 2007 UT 22 and it is also published in the Utah Advance Reports as 572 Utah Adv. Rep. 3. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Amendment I

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress or grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; not deny to any person within the jurisdiction the equal protection of the laws.

§ 76-10-1206 U.C.A.

> (1) A person is guilty of dealing in material harmful to minors when, knowing that a person is a minor, or having failed to exercise reasonable care in ascertaining the proper age of a minor, he:
>
> > (a) intentionally distributes or offers to distribute, exhibits or offers to exhibit to a minor any material harmful to minors;
> >
> > (b) intentionally produces, presents, or directs any performance before a minor that is harmful to minors; or
> >
> > (c) intentionally participates in any performances before a minor, that is harmful to minors.

§ 76-2-103 U.C.A.

A person engages in conduct:

> (3) Recklessly, or maliciously with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the results will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all of the circumstances as viewed from the actor's standpoint.

STATEMENT OF THE CASE

The following Statement of facts is taken substantially from the Opinion of the Utah Court of Appeals, Utah's intermediate appellate court, in *State v. Haltom*, 121 P.3d 42, 45 (Utah App. 2005) with additions as noted:

> On August 4, 2000, just a few days after Dr. John's Lingerie and Novelty store (Dr. John's) opened for business, police in Midvale, Utah sent BP, a seventeen-year-old girl, into the store to attempt to buy an adult film. She entered the store and was soon thereafter approached by Vadim Sapergueldiev (Vadim), who asked to see her identification. BP gave Vadim, who was an employee of Doctor John's but not actually on duty when BP entered, her driver license. He glanced at it and then gave it back and permitted her to shop. After wandering the store for a few minutes, BP went to the adult video rack where she chose one at random and then went to the counter to make the purchase. As she shopped, Vadim called Haltom, a part owner of Dr. John's, to the counter and asked him how one would determine whether a license was authentic. Haltom

> informed Vadim that if BP attempted to purchase an adult video, he would show him. As BP approached the counter, Haltom asked her for her identification and she again produced her drivers license.
>
> Haltom took the license and examined it. Among the relevant information contained on the license were BP's photo, name, address, social security number, and her date of birth, which clearly showed that BP was born in December 1982, and was therefore just seventeen years old at the time. Haltom carefully compared BP to the photo and then asked her to recite her social security number – printed next to her date of birth – and her address. When she gave an address with a street name rather than coordinates, Haltom became concerned and asked her to clarify her answer. She responded with the proper coordinate address which corresponded with the address on the license, and Haltom handed back the license. Vadim than asked Haltom if he could sell the video to BP and Haltom answered: "What's the problem? It's her I.D. and she's eighteen right?" Vadim completed the sale as Haltom was talking with BP and she left the store.

Minors are not allowed into the store, and all customers are met at the door by a clerk who checks their ID. On August 1, 2000, Midvale police sent a 17 year old boy into the store to attempt to buy an adult video. According to Detective Brimley "his ID was checked, and he was sent out of the store, no purchase made." The incident on August 4, followed.

Defendant, and employees Emily Wright, Teresa Ferrone and Bonnie Bolton testified that the store had in place a regular procedure to check identification to keep

out minors. On at least one occasion within a week of the incident at issue, the system worked, and a minor was barred from the store. On August 4, the store's most experienced employee did check the ID of the minor as she entered. For whatever reason, Mr. Sapergueldiev violated store policy and allowed her inside. It was only after the first check had inexplicably failed that Defendant became involved at the specific request of the employee. Defendant testified that this was not his job, that he was in his office on the second floor at the time, and that he was specifically called down, not to check on age, but to answer a question on verification of identity. His testimony and that of Ms. Pearson do not contradict: He concentrated on the identification of Ms. Pearson, rather than her age. He asked her for personal information from the license, which she was able to produce, and he seemed satisfied, allowing the first employee to finish selling her the video.

At trial, Defendant requested and received a jury instruction on criminal negligence as the standard required to convict. Only on appeal to the Utah Court of Appeals did the State argue that the standard should be that of simple negligence. The Utah Supreme Court granted Certiorari on the question of whether the Court of Appeals had erred in determining that simple negligence was sufficient to convict. The Utah Supreme Court specifically ruled on the constitutional question of whether such a standard in a felony implicating the First Amendment was sound, as detailed below.

REASONS FOR GRANTING THE WRIT

THE UTAH SUPREME COURT COMMITTED A CONSTITUTIONAL ERROR WHEN IT RULED THAT SIMPLE NEGLIGENCE ONLY WAS REQUIRED FOR CONVICTION OF THE FELONY OF DEALING IN MATERIALS HARMFUL TO MINORS. THE FIRST AMENDMENT REQUIRES A DETERMINATION OF *SCIENTER* FOR SUCH A CONVICTION.

Defendant was convicted, after a jury trial, of dealing in material harmful to a minor, a violation of § 76-10-1206 U.C.A. and a third degree felony, punishable by up to five years imprisonment. The material is an admittedly adult video which Defendant's store held for sale to adults only. There is no dispute that he was not the person who checked the minor's ID, allowed her into the store or actually made the sale. The question for the jury therefore was whether he used "reasonable care" as defined by the statute in attempting to avoid such distribution, even though this was not his job. The trial court originally ruled that criminal negligence was the required standard under § 76-2-103 U.C.A. The Utah Supreme Court held that the language of the statute required only a finding of simple negligence of the sort usually reserved to civil cases, to support of conviction, in *State v. Haltom*, 2007 UT 22, ¶ 9; 572 Utah Adv. Rep. 3 (Utah 2007):

> Mr. Haltom contends that United States Supreme Court precedent "surely support[s] the contention that, in the area of distribution of non-obscene and constitutionally protected adult materials, mere negligence in distributing to a minor is not a constitutionally sound standard." Mr. Haltom looks to *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), as the case most supportive of

> this contention. There the Supreme Court read a scienter requirement into a section of the Protection of Children against Sexual Exploitation Act of 1977. On its face, the text of the act would have permitted the conviction of persons who sold [in interstate commerce] visual depictions of minors engaged in explicit sexual conduct without regard to whether the defendant could reasonably discover the age of the person depicted. *Id.* at 69. The Supreme Court found it appropriate to fill the scienter gap with the "knowing" mental state that Congress assigned to other provisions of the act. *Id.* at 78. The Supreme Court, however, did not go so far as to infer that holding a defendant criminally accountable for distributing adult materials to a minor through "mere negligence" would offend the United States Constitution. Indeed, the Court's statements suggest the opposite. It noted that little or no *mens rea* might be necessary to justify proscribing conduct in which "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain the victim's age." *Id.* at 72 n.2.

In *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) this Court dealt with a statute which prohibited "knowingly" transporting child pornography in interstate commerce. The Ninth Circuit had held the law facially unconstitutional because it did not require a *scienter* requirement regarding the age of the performer. This Court read the statute as containing the requirement that the Defendant also knew of the presence of a minor in such material, even though the statute did not directly say so. The Court said:

> A final canon of statutory construction supports the reading that the term "knowingly" applies to

> both elements. Cases such as *Ferber*, 458 U.S. at 765 ("as with obscenity laws, criminal responsibility may not be imposed without some element of *scienter* on the part of the defendant"); *Smith v. California*, 361 U.S. 147 (1959); *Hamling v. United States*, 418 U.S. 87 (1974) and *Osborne v. Ohio*, 495 U.S. 103, 115 (1990), suggest that a statute completely bereft of a *scienter* requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress. *Id.* at 78.

Each of the cases referred to by the Court here required a *scienter* requirement for criminal liability for such crimes as distribution of child pornography. See *New York v. Ferber*, 458 U.S. 747 (1982); and *Osborne v. Ohio*, 495 U.S. 103, 115 (1990) involving the possession of child pornography: "The statute on its face lacks a *mens rea* requirement, but that omission brings into play and is cured by another law that plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of *scienter.*"

The Supreme Court has strongly favored the requirement of *mens rea* even in cases not involving the First Amendment, especially when a serious penalty may attach to a violation. See *Morrissette v. United States*, 342 U.S. 246, 250 (1952): "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Also see *United States v. United States Gypsum Co.*, 438 U.S.

422, 436-437 (1978): "the existence of a mens rea is the rule rather than the exception to, the principles of Anglo-American criminal jurisprudence." And in *Staples v. United States,* 511 U.S. 600 (1994) this Court reiterated that "offenses which require no mens rea generally are disfavored". *Id.* at 616. This principle is more firm when a harsh penalty is imposed. *Id.* at 622.

The Florida Supreme Court, in *State v. Giorggetti*, 868 So.2d 512, 518 (Fla. 2004) discussed the *scienter* requirement as a requirement of due process in some cases, specifically referring to *X-Citement Video*:

> Because *scienter* is often necessary to comport with due process requirements, we ascribe the Legislature with having intended to include such a requirement. Cf. *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 73, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (noting, in case where intent was read into statute to avoid constitutionality problems, "we do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court").

See also *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 297 (Colo. 1995). The State Supreme Court there reviewed an ordinance which allowed the revocation of a business license for a sexually oriented business if an employee violated any portion of the licensing ordinance. The Court stated:

> In addition, as the trial court observed, section 8-1-801(D) of the Code is not narrowly tailored at all. Any violation of any legislative prohibition triggers mandatory suspension or revocation. Section 8-1-801 of the Code contains no criteria indicating what circumstances warrant suspension as

> opposed to revocation. Such a sweeping regulation, however appropriate in other contexts, is not narrowly drawn to insure maximum opportunity for constitutionally protected modes of expression. In view of the danger of censorship and arbitrary suppression inherent in the application of imprecise standards, regulations granting government officials excessive discretion to regulate constitutionally protected modes of expression are unconstitutional on their face. *Kunz v. New York*, 340 U.S. 291, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); see *Vance v. Universal Amusement Co.*, 445 U.S. 308, 311 n. 3, 100 S.Ct. 1156, 1159 n. 3, 63 L.Ed.2d 413 (1980). We agree with the trial court's conclusion that the provisions of section 8-1-801(D) of the Code are invalid as applied to sexually explicit business licensees.

See also *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358, 1368 (11th Cir. 1999) holding "that due process requires at least individualized proof of intent or act" in order to support a conviction of a crime that may bring incarceration.

These cases surely support the contention that, in the area of distribution of non-obscene and constitutionally protected adult materials, mere negligence in distributing to a minor is not a constitutionally sound standard. The affirmative duty which is required here is the duty to take reasonable measures to see that distribution is not made to minors; and violating that duty requires more than mere negligence. The specific statute which Defendant was accused of violating here uses the word "intentionally" in each of its three subsections describing the prohibited conduct. Regarding the age of the other person, the statute requires either knowledge or the failure "to exercise

reasonable care". While this obviously includes a lower standard than that of knowledge, it is error to read it as simple negligence, for the same reasons set out in *X-Citement Video*.

The Utah Court of Appeals reviewed the evidence necessary for a conviction of a crime involving criminal negligence in *State v. Larsen*, 2000 UT App 106, 999 P.2d 1252 (Utah App. 2000). The Court there said:

> Conduct is not criminally negligent unless it constitutes a "'gross deviation' from the standard of care exercised by an ordinary person." *State v. Standiford*, 769 P.2d 254, 267 (Utah 1998). "[O]rdinary negligence, which is the basis for a civil action for damages, is not sufficient to constitute criminal negligence." *Id.* In *State v. Warden*, 784 P.2d 1204 (Utah App. 1989), this Court explained, "'[m]ere inattention or mistake in a judgment resulting even in death of another is not criminal unless the quality of the act makes it so.'" *Id.* At 1207; See 21 *Am.Jur.* 2d Criminal Law §136 (1998) ("The 'negligence' required in this context must be more than the lack of ordinary care and precaution; it must be something more than the mere inadvertence or misadventure, but rather a recklessness or indifference incompatible with a proper regard for human life.");. . . . 2000 UT App 106, ¶ 18.

Defendant there had been convicted by the trial court of negligent homicide, a Class A Misdemeanor, for his failure to yield at an intersection and turning left in front of another vehicle, resulting in a collision. The Court went on to say:

> In this case, defendant's conduct, while apparently negligent, does not rise to the level of

> criminal negligence. Defendant's conduct is more accurately characterized as a serious mistake in judgment. The facts presented at trial do not indicate that defendant's action were undertaken recklessly or with an indifference to human life, nor does the quality of defendant's act lead to the conclusion that his actions were criminal. Rather, defendant simply failed to see an oncoming car which was visible to other drivers as he made a left turn, with tragic consequences. 2000 UT App 106, at ¶ 21.

Defendant asserts that at least the same standard should apply here and that a conviction should require that he was reckless and that his conduct constituted "a gross deviation from the standard of care that an ordinary person would exercise." Any mistake in judgment by Defendant, however, does not rise to the standard of criminal negligence; and unlike the mistake in *Larsen*, nobody died. Failure to afford the same standard to Defendant here constitutes a denial of equal protection of the law; and can only be justified based on a moral judgment as to the nature of the material involved. Selling written or pictorial material which might be objectionable to some, but which has not been adjudged legally obscene is protected by the First Amendment. Therefore, while the sale of such material might cause some danger that it might be sold to a minor, that risk is sufficiently reduced by making the sale subject to penalties for criminal negligence. The risk must be balanced against the need to encourage the free flow of ideas. This is not the same sort of danger inherent in drunk driving, and cannot be remedied in the same manner. As the Utah Supreme Court has stated:

> When state action impinges on fundamental rights, due process requires standards which

> clearly define the scope of permissible conduct so as to avoid unwarranted intrusion on those rights. A statute which affects fundamental liberties is unconstitutional if it is so vague that "men of common intelligence must necessarily guess at its meaning. *In re Boyer*, 636 P.2d 1085, 1087-8 (Utah 1981)."

The Court there also held that it is the duty of the Court to construe the statute to avoid constitutional problems if possible. Therefore, the obvious corollary is that any uncertainty in statutory terms must be resolved favorably to the Defendant.

Here, it is sufficient to say that it was this employee who failed in his duty to keep the minor out of the store. Defendant was in his office upstairs at the time of the incident, and was only called down by Mr. Sapergueldiev because of his expressed concern that perhaps the minor might not be the person in the photograph (R. 677 p. 222-3). Given the existence of the system as described by the several witnesses, it is reasonable to assume that Defendant felt justified in assuming that the date of birth had been checked. His presence was only for further verification of the identification of the young lady. He checked her address, he checked her social security number, and he compared facial features. After doing so, he told Mr. Sapergueldiev that he was satisfied that she was the person pictured on the driver license. Defendant was only implicated in the crime because he had gone the extra mile to prevent someone using a false ID for unlawfully purchasing an adult item. If he had simply stayed up in his office and told the employee, "you are experienced enough, I trust your judgment," he would not have been at fault. Defendant's personal involvement in this incident does not support the charge. To the contrary, it shows an additional

attempt to avoid negligence. Utah driver licenses are set up with a conscious effort to avoid those under 21 purchasing alcohol. With that in mind, the words "minor" (meaning under 21) and a separate statement "under 21" are featured prominently on the license (St. Ex. 1). The date of birth is less prominent; and *it was not Defendant's regular job* to do the checking in this regard. This clearly is an isolated instance. Defendant cannot be expected to personally double-check every customer who comes into one of his numerous stores. The fact that he attempted to do so on this occasion does not impose such duty; and the duty was thus not violated. The evidence, as a matter of law, does not rise to the standard required by the First Amendment and Due Process of Law. Failing to include a *scienter* requirement would chill the exercise of First Amendment rights.

CONCLUSION

The Utah Supreme Court failed in its duty when it found the standard of simple negligence to apply to the conduct of Defendant, in conflict with previous decisions on criminal felonies involving the free speech guarantee of the First Amendment. The opinion of the Utah Supreme Court should be fully reviewed for constitutional error by this Court; and Certiorari should be granted.

DATED this 22 day of May, 2007.

Respectfully submitted,

W. ANDREW MCCULLOUGH, L.L.C.

W. ANDREW MCCULLOUGH
Attorney for Petitioner
6885 South State Street Suite 200
Midvale, Utah 84047
Telephone: (801) 565-0894

2007 WL 542376

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Respondent,

v.

John Vonderhaar Haltom,
Defendant and Petitioner.

No. 20050815

FILED

February 23, 2007

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Third District, Salt Lake
The Honorable Dennis M. Fuchs
No. 001913808

Attorneys: Mark L. Shurtleff, Att'y Gen., Christine F. Soltis, Asst. Att'y Gen., Salt Lake City, for plaintiff W. Andrew McCullough, Midvale, for defendant

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On Certiorari to the Utah Court of Appeals

NEHRING, Justice:

INTRODUCTION

¶ 1 John Haltom was convicted of dealing in material harmful to a minor, a third degree felony under Utah Code section 76-10-1206 (2000),[1] and appealed his case to

[1] After the defendant was charged in 2000, the statute was amended to read that a violation occurs when a defendant acts recklessly or negligently in failing to ascertain the age of a minor-buyer before intentionally distributing material harmful to him or her. Utah

(Continued on following page)

the court of appeals. Utah Code section 76-10-1206 renders criminal the sale of harmful material to a minor if the person making the sale "fail[s] to exercise reasonable care in ascertaining the proper age of a minor." The court of appeals interpreted "reasonable care" to be synonymous with ordinary negligence and concluded that the trial record contained adequate evidence of Mr. Haltom's negligence to affirm his conviction. We granted certiorari to consider whether the court of appeals was correct when it evaluated Mr. Haltom's conduct against the standard of ordinary negligence. We hold that the court of appeals was correct and affirm.

STANDARD OF REVIEW AND BACKGROUND

¶ 2 The issue we take up today presents a pure question of law. We therefore review the decision of the court of appeals for correctness. We need not dwell on the facts that the jury considered in convicting Mr. Haltom. By providing a brief summary of the circumstances that led to Mr. Haltom's felony conviction, we merely provide context for our legal analysis and offer fair warning that law enforcement officials, at least those in the city of Midvale, are apt to display considerable zeal in enforcing statutes that regulate the operation of sexually oriented businesses and the sale of their products.

¶ 3 Mr. Haltom is a co-owner of Dr. John's Lingerie and Novelty Store. From the day it opened, Dr. John's was not seen as a welcome addition to Midvale's commercial

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Code Ann. § 76-10-1206 (2003 & Supp. 2005). All citations to section 76-10-1206 in this opinion refer to the statute in effect in the year 2000 when Mr. Haltom was charged.

community, and the offended citizens of Midvale complained to the police department about the store's wares. The department sent a thirty-year-old detective to the store who twice bought adult-only videos without being asked to verify his age. Based on his experience with the purchases, the detective believed that the store would sell merchandise to a minor. To advance his theory, the detective solicited minors to test Dr. John's age verification protocols. The store first turned away a seventeen-year-old boy at its door, but Dr. John's failed its second test.

¶ 4 Brittany was seventeen years old when she entered Dr. John's on August 4, 2000. She would turn eighteen on December 12, 2000. An employee approached Brittany when she entered the store and asked for her identification. She presented her driver's license. The employee "glanced" at it but permitted her to remain in the store. After touring the premises for several minutes, Brittany selected the video "Getting Wet, the Last Howl." The video's status as material harmful to a minor was not disputed. *See* Utah Code Ann. § 76-10-1201(4), (6) (2003) (defining "harmful" and "material"). Brittany brought the video to the counter where Mr. Haltom was standing and sought to purchase it. Mr. Haltom asked Brittany for her identification, and she again produced her driver's license. Mr. Haltom compared Brittany's features with the photograph on the license and asked her to repeat her social security number. He asked her for her address and questioned her closely about it because Brittany first gave Mr. Haltom a street name instead of the directional coordinate number listed on her license. The sale of the video and Mr. Haltom's arrest followed.

¶ 5 The jury that convicted Mr. Haltom was instructed that he could not be found guilty unless he acted

recklessly when he failed to accurately ascertain Brittany's age. At the court of appeals, Mr. Haltom claimed that, based on his own conduct and his assumptions about the age verification measures undertaken by the employee who confronted Brittany when she entered the store, the evidence fell short of establishing his recklessness. The State countered that the trial court erred when it instructed the jury that recklessness was the requisite mental state for the crime. The State argued that section 76-10-1206's "reasonable care" language made ordinary negligence the standard to establish culpability for the crime of dealing in material harmful to minors. The court of appeals agreed and found sufficient evidence of Mr. Haltom's negligence in the record to affirm his conviction. We granted certiorari to review whether the court of appeals correctly concluded that Mr. Haltom's ordinary negligence could result in his conviction of this third degree felony. We hold that the court of appeals was correct.

ANALYSIS

¶ 6 According to Mr. Haltom, the State cannot brand a person a felon for an act of ordinary negligence. So presented, Mr. Haltom's challenge does not ask us to resolve an ambiguity in section 76-10-1206. He concedes that an act of ordinary negligence may breach section 76-10-1206's affirmative duty to use "reasonable care" to authenticate the age of prospective purchasers of harmful material. This case, then, is not about whether the plain language of section 76-10-1206 communicates an intention to punish negligent conduct as a crime, because it clearly does. Rather, it is about whether, despite the statute's

plain language, section 76-10-1206 must be interpreted to require a degree of culpability beyond ordinary negligence.

¶ 7 Mr. Haltom proposes three reasons why section 76-10-1206 cannot mean what it says; we find none to be persuasive. First, Mr. Haltom contends that Utah law governing criminal mental states generally forecloses bringing ordinary negligence, as opposed to criminal negligence, within its scope. Utah Code section 76-2-101, however, allows the Legislature to specify a mental state that is different from the most commonly used ones like knowing, reckless, or criminal negligence. Specifically, section 76-2-101 states that a person has not committed an offense unless (1) the conduct is prohibited by law and (2) the person "acts intentionally, knowingly, recklessly, with criminal negligence, *or with a mental state otherwise specified in the statute defining the offense,* as the definition of the offense requires" (emphasis added). The Legislature exercised this power legitimately when it inserted the "reasonable care" standard into the text of section 76-10-1206.

¶ 8 Drawing on language from the Utah Court of Appeals' opinions, Mr. Haltom next contends that the ordinary negligence standard is limited to civil cases. He leans heavily on the statement made in *State v. Larsen* that "'[o]rdinary negligence, which is the basis for a civil action for damages, is not sufficient to constitute criminal negligence.'" 2000 UT App 106, ¶ 18, 999 P.2d 1252 (quoting *State v. Standiford,* 769 P.2d 254, 267 (Utah 1988)). We need not forswear the accuracy of this statement to reject Mr. Haltom's invocation of it. Ordinary negligence and criminal negligence are not the same. This is not to say that only criminal negligence may lead to criminal sanctions. Ordinary negligence is, of course, the

basis for civil damage actions. Its domain is not, however, bounded to civil actions.

¶ 9 Finally, Mr. Haltom attempts to stiffen his arguments with an appeal to constitutional law. Although his brief contains no direct citation to either the United States Constitution or the Utah Constitution, Mr. Haltom contends that United States Supreme Court precedent "surely support[s] the contention that, in the area of distribution of non-obscene and constitutionally protected adult materials, mere negligence in distributing to a minor is not a constitutionally sound standard." Mr. Haltom looks to *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), as the case most supportive of this contention. There, the Supreme Court read a scienter requirement into a section of the Protection of Children Against Sexual Exploitation Act of 1977. On its face, the text of the act would have permitted the conviction of persons who sold [in interstate commerce] visual depictions of minors engaged in explicit sexual conduct without regard to whether the defendant could reasonably discover the age of the persons depicted. *Id.* at 69. The Supreme Court found it appropriate to fill the scienter gap with the "knowing" mental state that Congress assigned to other provisions of the act. *Id.* at 78. The Supreme Court, however, did not go so far as to infer that holding a defendant criminally accountable for distributing adult materials to a minor through "mere negligence" would offend the United States Constitution. Indeed, the Court's statements suggest the opposite. It noted that little or no *mens rea* might be necessary to justify proscribing conduct in which "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain the victim's age." *Id.* at 72 n.2. This describes precisely the

encounter between Mr. Haltom and Brittany. In short, the United States Supreme Court has imposed no constitutional impediment to making merely negligent conduct criminal, and neither do we. Accordingly, we affirm the court of appeals.

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¶ 10 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Durrant, and Justice Parrish concur in Justice Nehring's opinion.

121 P.3d 42

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. John Vonderhaar Haltom, Defendant and Appellant.	)	OPINION (For Official Publication) Case No. 20040031-CA FILED (August 11, 2005)

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Third District, Salt Lake Department, 001913808
The Honorable Dennis M. Fuchs

Attorneys: W. Andrew McCullough, Midvale, for Appellant
Mark L. Shurtleff and Christine F. Soltis, Salt Lake City, for Appellee

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Before Judges Billings, Bench, and Thorne.

THORNE, Judge:

¶1 John Vonderhaar Haltom appeals his conviction for dealing in material harmful to a minor, a third degree felony, in violation of Utah Code section 76-10-1206 (2000). We affirm.

BACKGROUND

¶2 On August 4, 2000, just a few days after Dr. John's Lingerie and Novelty store (Dr. John's) opened for business, police in Midvale, Utah, sent BP, a seventeen-year-old girl, into the store to attempt to buy an adult film. She entered the store and was soon thereafter approached by

Vadim Saprgeuldiev (Vadim), who asked to see her identification. BP gave Vadim, who was an employee of Dr. John's but not actually on duty when BP entered, her driver license. He glanced at it and then gave it back and permitted her to shop. After wandering around the store for a few minutes, BP went to the adult video rack where she chose one at random and then went to the counter to make the purchase. As she shopped, Vadim called Haltom, a part owner of Dr. John's, to the counter and asked him how one could determine whether a license was authentic. Haltom informed Vadim that if BP attempted to purchase an adult video, he would show him. As BP approached the counter, Haltom asked her for her identification and she again produced her driver license.

¶3 Haltom took the license and examined it. Among the relevant information contained on the license were BP's photo, name, address, social security number, and her date of birth, which clearly showed that BP was born in December 1982 and was therefore just seventeen years old at the time. Haltom carefully compared BP to the photo and then asked her to recite her social security number – printed next to her date of birth – and her address. When she gave an address with a street name rather than coordinates, Haltom became concerned and asked her to clarify her answer. She responded with the proper coordinate address, which corresponded with the address on the license, and Haltom handed back the license. Vadim then asked Haltom if he could sell the video to BP and Haltom answered "What's the problem? It's her I.D. [and] she's eighteen, right?" Vadim completed the sale as Haltom was talking with BP and she left the store.

¶4 Soon thereafter, BP returned to the store with Detective Brimley, the Midvale City Police officer who had sent

her into Dr. John's. Brimley informed Haltom that he had sold an adult video to a minor – BP – and BP identified Vadim and Haltom as the people she had dealt with during the transaction. Haltom was arrested for dealing with material harmful to a minor, in violation of Utah Code section 76-10-1206 (2000).

¶5 Prior to trial, Haltom petitioned to have the charges dismissed because, he argued, he had been entrapped as a matter of law. The State responded and a hearing was scheduled, during which Haltom presented just one witness – Curtis Gorman, a former employee who had been fired for stealing from Haltom and who had been referred to the Midvale Police Department by Haltom for that theft. Haltom argued that Brimley had established a relationship with Vadim, and that Brimley had used Vadim as a police agent to induce Haltom to sell the video to BP. Through Gorman's testimony, Haltom introduced evidence that Brimley was interested in subverting a Dr. John's employee, and that, at Brimley's urging, Gorman had talked with Vadim about meeting with Brimley. But, Gorman never again met with Brimley and he had no idea whether Brimley had been able to talk with Vadim, or if, assuming such an encounter occurred, Vadim had agreed to work with Brimley. Consequently, the trial court denied Haltom's motion, but informed all parties that Haltom would be given the opportunity to present his entrapment claim to the jury as a factual defense to the charge.

¶6 The case was subsequently tried in front of a jury, which convicted Haltom. Haltom filed a post-trial motion to arrest the judgment, which the trial court denied, and he was sentenced to a statutory term of imprisonment of zero to five years in prison. The trial court, however,

suspended all but thirty days of that time and placed Haltom on probation. Haltom now appeals.

ISSUES AND STANDARD OF REVIEW[1]

¶7 Haltom argues that the trial court erred in concluding that he had not been entrapped as a matter of law. The trial court's decision presents a mixed question of fact and law. *See State v. Beddoes,* 890 P.2d 1, 3 (Utah Ct. App. 1995). Although we review factual findings for clear error and legal conclusions for correctness, due to the factually sensitive nature of entrapment cases we will affirm the trial court's decision "unless we can hold, based on the given facts, that reasonable minds cannot differ as to

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[1] Although on appeal Haltom argues that his due process rights were violated when Brimley erased the audio tape made during his interview with Gorman, he failed to preserve this argument below. *See State v. Dean,* 2004 UT 63, ¶13, 95 P.3d 276 (stating "appellate courts will not consider an issue, including constitutional arguments, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances"); *see also State v. Irwin,* 924 P.2d 5, 7-8 (Utah Ct. App. 1996). Had Haltom preserved this issue "[t]he materiality required to reverse a criminal conviction for . . . destruction of evidence as a denial of due process is more than evidentiary materiality." *State v. Nebeker,* 657 P.2d 1359, 1363 (Utah 1983). "The evidence must be material in a constitutional sense." *State v. Humphrey,* 793 P.2d 918, 926 (Utah Ct. App. 1990). To meet this threshold, Haltom must show that the " 'evidence is vital to the issues of whether [he] is guilty of the charge *and* whether there is a fundamental unfairness that requires the Court to set aside [his] conviction.' " *Id.* (quoting *State v. Lovato,* 702 P.2d 101, 106 (Utah 1985)). Haltom does not meaningfully assert that anything on the destroyed tape satisfies this burden, and in fact, Gorman's version of the taped interview largely agreed with Brimley's version. Thus, it is questionable whether Haltom would have been able to demonstrate harm resulting from the destruction of the tape. Nevertheless, because he failed to preserve this issue in the trial court, we will not address the substance of the argument here.

whether entrapment occurred." *Id.* Only when reasonable minds could not differ can we find entrapment as a matter of law. *See id.*

¶8 Haltom next argues that the trial court erred in concluding that certain testimony was inadmissible hearsay. "Whether a statement is offered for the truth of the matter asserted is a question of law, which we review under a correction of error standard." *State v. Perez,* 924 P.2d 1, 2-3 (Utah Ct. App. 1996).

¶9 Haltom also argues that the trial court's decision on the relevance of certain statutory changes to the format of minors' driver licenses was incorrect. "While relevant evidence is generally admissible, a trial court has broad discretion to determine whether proffered evidence is relevant, and we will find error . . . only if the trial court has abused its discretion." *State v. Harrison,* 805 P.2d 769, 780 (Utah Ct. App. 1991) (citation omitted).

¶10 Finally, Haltom argues that the evidence was insufficient to support his conviction both as a matter of law and of fact. Haltom's argument falls into two categories. First, he asserts that his activities did not constitute a violation of section 76-10-1206 as a matter of law, which under these circumstances presents a question of statutory interpretation that we review for correctness. *See State v. Bluff,* 2002 UT 66, ¶37, 52 P.3d 1210. Second, he asserts that the evidence was not sufficient to support the jury's verdict. "[W]hen reviewing a claim of insufficiency of the evidence, the evidence and all reasonable inferences that may be drawn therefrom are viewed in the light most favorable to the jury verdict." *State v. Warden,* 813 P.2d 1146, 1150 (Utah 1991).

ANALYSIS

¶11 Haltom first argues that the trial court erred in failing to dismiss the complaint because he was entrapped as a matter of law. "Utah has never recognized a per se rule of entrapment." *State v. Beddoes,* 890 P.2d 1, 3 (Utah Ct. App. 1995). Instead, Utah has adopted an objective standard through which all entrapment claims will be examined, with the focus on whether the police conduct created "a substantial risk that a normal law-abiding person would be induced to commit a crime." *State v. Martinez,* 848 P.2d 702, 706 (Utah Ct. App. 1993); *see also State v. Taylor,* 599 P.2d 496, 500 (Utah 1979) (stating that the objective view asks whether "the conduct of the government comport[s] with a fair and honorable administration of justice"). Under an objective standard, law enforcement officials are not denied the use of decoys. *See Taylor,* 599 P.2d at 500. Nor are police prohibited from using people that a defendant might consider to be a friend. *See Martinez,* 848 P.2d at 707 (stating "the mere existence of a personal relationship does not establish entrapment"). Instead, the focus of our objective test is on examining whether the government conduct created or manufactured a crime. *See Taylor,* 599 P.2d at 500-01 ("Nothing can be more reprehensible than to induce the commission of crime for the purpose of apprehending and convicting the perpetrator." (quotations and citation omitted)). Consequently, to determine whether an entrapment has occurred fact finders are required to examine whether law officers, or their agents, induced "the commission of an offense in order to obtain evidence . . . by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it." *Beddoes,* 890 P.2d at 3 (alteration in original) (quotations and citations omitted).

¶12 Haltom argues that he would not have sold an adult video to a minor in the absence of Vadim's alleged relationship with Brimley. However, at best, the evidence Haltom offered in support of this assertion is subject to multiple interpretations, ranging from the one offered by Haltom – that Vadim became an agent of the State – to the one offered by the State – that Vadim did nothing to assist Brimley's crusade against Dr. John's. Moreover, had the evidence of Vadim's relationship with the State been less tenuous, this alone is still insufficient to establish entrapment as a matter of law. *See id.* (noting that exploitation of a relationship is a necessary factor to meet the requirements of entrapment). This is especially true given Haltom's decision to ask BP for her identification and examine it. Once he did this, there is no evidence that Vadim attempted to coerce or convince Haltom to ignore her date of birth, or that Vadim told Haltom that he had already checked the birthdate and that there was no need to do so again. Rather than an issue that could be settled as a matter of law, Haltom presented the trial court with evidence that could have supported Haltom's entrapment defense, but that also could have been interpreted as insignificant. Consequently, because reasonable minds easily could differ on the question of entrapment as a matter of law in this case, the trial court properly denied Haltom's motion.[2] *See id.*

¶13 Haltom next argues that the trial court erred in suppressing a portion of Theresa Ferrone's testimony as inadmissible hearsay. Rule 801(c) of the Utah Rules of Evidence defines hearsay as "a statement, other than one

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[2] Haltom presents no challenge to the jury's refusal to accept his entrapment defense as a matter of fact.

made by the declarant . . . , offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c). "'[I]f an out-of-court statement is "offered simply to prove that it was made, without regard to whether it was true, such testimony is not proscribed by the hearsay rule."'" *In re G.Y.*, 962 P.2d 78, 84 (Utah Ct. App. 1998) (quoting *State v. Olsen*, 860 P.2d 332, 335 (Utah 1993)). "To the extent that there is no factual dispute, whether a statement is offered for the truth of the matter asserted is a question of law, which we review under a correction of error standard." *Id.* (quotations, citation, and alteration omitted).

¶14 Haltom argues that the trial court erred in concluding that he was offering Ferrone's testimony concerning a conversation with Vadim for the truth of the matter asserted. Specifically, Haltom suggests that Ferrone's testimony was offered to bolster Haltom's claim that Vadim was an expert in the store's policies and accepted methods for identifying and excluding minors from the premises. Assuming that Haltom's version of the testimony is correct, we do not believe that the statements were offered for the truth of the matter asserted.[3] In fact, the excluded statement would have done nothing more than support Haltom's claim that Vadim was the store trainer and that he was quite aware of the store policy concerning the admission of minors.

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[3] During her direct examination, Ferrone was asked if Vadim had provided her with any instruction or training in addition to that provided by Haltom. She responded "Vadim just told me, you know, you need to check every I.D. . . ." at which point the State objected. The court sustained the objection. The State offered no reason for its objection, but the court informed Haltom that "[a]ny hearsay is off."

¶15 However, the trial court's erroneous exclusion of Vadim's statements does not necessarily require the reversal of Haltom's conviction. "'[W]e do not upset the verdict of a jury merely because some error or irregularity may have occurred, but will do so only if it is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result.'" *State v. Hutchison,* 655 P.2d 635, 636 (Utah 1982) (quoting *State v. Urias,* 609 P.2d 1326, 1329 (Utah 1980)). "Where evidence is excluded by the trial court and the substance of such evidence is later admitted through some other means, any error which may have resulted is cured." *State v. Colwell,* 2000 UT 8, ¶29, 994 P.2d 177. Here, although the trial court disallowed Haltom's attempt to use Vadim's own words to support Haltom's assertion that Vadim knew the store policy well enough to train others, Haltom was able to present other evidence of Vadim's role as Dr. John's trainer. For instance, Haltom's long-time employee Bonnie Bolton testified that she was trained by Vadim on how to "card" potential patrons to ensure that they were not minors. During Haltom's testimony, he identified Vadim as "a senior employee," one sufficiently experienced to appear in the background of a Dr. John's promotional video carding potential customers. He further testified that he brought Vadim in from Nebraska to train the Utah employees and that Vadim was a trusted employee. Thus, although the jury was not presented with Vadim's statements, ample evidence of Vadim's knowledge was presented to the jury through other avenues. Thus, even though the trial court erred in suppressing the statement, the error was not harmful. *See, e.g., State v. Blubaugh,* 904 P.2d 688, 697-98 (Utah Ct. App. 1995) (concluding that trial court's error

was harmless because sufficient similar evidence was presented to the jury to render the error harmless).

¶16 Haltom also argues that the trial court erred in denying his attempt to introduce subsequent legislative changes to the format of driver licenses for minors. "While relevant evidence is generally admissible, a trial court has broad discretion to determine whether proffered evidence is relevant, and we will find error in a relevancy ruling only if the trial court has abused its discretion." *State v. Harrison,* 805 P.2d 769, 780 (Utah Ct. App. 1991) (citation omitted). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401; *see also Colwell,* 2000 UT 8 at ¶27.

¶17 The trial court in this instance did not exceed the permitted range of its discretion. Haltom's defense was never predicated on a claim that he was unfamiliar with the format of Utah's driver licenses, or that he was confused by BP's identification in particular. Instead, his defense centered entirely upon his reliance on Dr. John's policy of precluding minors from the premises, his expectation that his employees would not fail in enforcing the policy, and his claim that the Midvale police used Vadim to entrap Haltom. The subsequent legislative changes to the driver license format were irrelevant to the defenses offered by Haltom, and therefore we conclude that the trial court acted well within its permitted range of discretion in refusing to allow Haltom to introduce evidence of the changes.

¶18 Haltom's final and most forceful argument is that the evidence was insufficient as a matter of law to convict him of dealing in materials harmful to a minor. More concisely, Haltom asserts that the State failed to prove that he violated the statute when he sold the video to BP. To address Haltom's challenge properly, we must first determine the culpable mental state required to violate section 76-10-1206. Only after doing so can we examine the merits of his argument.

¶19 Section 76-10-1206 states:

> A person is guilty of dealing in material harmful to minors when, knowing that a person is a minor, or *having failed to exercise reasonable care in ascertaining the proper age of a minor,* he:
>
> > (a) intentionally distributes or offers to distribute; exhibits or offers to exhibit to a minor any material harmful to minors.

Utah Code Ann. § 76-10-1206(1) (2003) (emphasis added). "When interpreting statutes, our primary goal is to evince the true intent and purpose of the Legislature." *State v. Martinez,* 2002 UT 80, ¶8, 52 P.3d 1276 (quotations and citations omitted). "To discover that intent, we look first to the plain language of the statute." *State v. Bluff,* 2002 UT 66, ¶34, 52 P.3d 1210 (quotations and citation omitted). "When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning." *Martinez,* 2002 UT 80 at ¶8. "[T]hus, the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." *Bluff,* 2002 UT 66 at ¶34 (quotations and citation omitted). "Furthermore, we 'avoid interpretations that will render portions of a statute superfluous or inoperative.'" *Martinez,* 2002 UT 80 at ¶8

(quoting *Hall v. State Dep't of Corr.*, 2001 UT 34, ¶15, 24 P.3d 958).

¶20 At issue in the instant case is the meaning of the phrase "having failed to exercise *reasonable care* in ascertaining the proper age." Utah Code Ann. § 76-10-1206(1) (emphasis added).[4] "Reasonable care" is defined as "[t]hat degree of care which a person of ordinary prudence would exercise in the same or similar circumstances, [and f]ailure to exercise such care is *ordinary negligence.*" Black's Law Dictionary 1265 (6th ed. 1990). Haltom has presented us with no reason to believe that the legislature intended a different meaning, or with any case law that would support his position in the face of this language. *Compare State v. Hamblin,* 676 P.2d 376, 378-79 (Utah 1983) (concluding that the legislature's use of the term "negligence" warranted a conclusion that the elements of automobile homicide were met if the state could show that the defendant had been simply negligence, and not criminally negligent), *with State v. Larsen,* 2000 UT App 106, ¶17-18, 999 P.2d 1252 (noting that the legislature intended criminal negligence to be the applicable mens rea for negligent homicide when it used the term "criminal negligence" in the statute). Although section 76-12-1206 uses neither of the terms "simple negligence" or "ordinary negligence," it does contain the phrase "reasonable care." "Reasonable care" carries with it a commonly accepted definition, and thus, we are bound by its meaning. Consequently, we conclude that a

[4] The statute also creates liability for selling "harmful material" to someone the seller knows to be a minor. *See* Utah Code Ann. § 76-10-1206(1) (2003). However, Haltom is not, and has never been, accused of actually knowing that BP was a minor at the time of the sale. Accordingly, we limit our analysis to Haltom's failure to determine BP's age and whether that failure violated the statute.

person violates section 76-10-1206 if they act with simple or ordinary negligence in failing to discover that the recipient of "harmful material" is a minor, prior to providing the material.

¶21 Having determined the simple negligence is sufficient to violate section 76-10-1206, we turn our attention to examining whether the evidence here was sufficient to support Haltom's conviction.[5] "In making the determination as to whether there is sufficient evidence to uphold a conviction, an appellate court does not sit as a second fact finder." *State v. Warden,* 813 P.2d 1146, 1150 (Utah 1991). "[W]hen reviewing a claim of insufficiency of the evidence, the evidence and all inferences that may be drawn therefrom are viewed in the light most favorable to the jury verdict." *Id.*

¶22 The jury was presented with evidence that BP entered Dr. John's, that she selected an adult video, and that she took it to the counter. There, Haltom asked her for her identification after Vadim called him over and asked him to demonstrate how to confirm the authenticity

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[5] Although Haltom's conviction was based on the jury's finding that he was reckless when he sold the video, this error is not fatal to his conviction. *See State v. Perez,* 924 P.2d 1, 3 (Utah Ct. App. 1996) ("[W]e may not interfere with a jury verdict unless upon review of the entire record, there emerges error of sufficient gravity to indicate that a defendant's rights were prejudiced in a substantial manner." (quotations and citation omitted)). The trial court's instruction forced the State to meet a higher mens rea standard than required under the statute, and because the principles underlying "simple negligence" are incorporated within the definition of recklessness, the jury must have, by necessity, found Haltom also to be negligent when they determined that he had been reckless. *Cf.* Utah Code Ann. § 76-2-104 (2003). Therefore, although the trial court erred in instructing the jury, the error could not have prejudiced Haltom and was thus harmless.

of a person's identification. BP gave Haltom her driver license, and Haltom compared the picture on the license to BP. Satisfied that the picture was indeed of BP, he asked her to confirm virtually every piece of material information on the license, including her address and social security number, but oddly not her date of birth. BP answered all of his questions, but Haltom became suspicious when the address she provided did not match the street address on the license. However, when questioned further, she provided an equivalent coordinate address that was identical to the one on the license. Satisfied that the identification was hers, Haltom instructed Vadim to sell BP the video.

¶23 Examining all of these facts, and the inferences that can be drawn from them, in a light most favorable to the jury's verdict, we conclude that, as a factual matter, the evidence was sufficient. Haltom held the license and examined it to ensure that it was authentic. He read every line material to ensuring the authenticity except the date of birth. Thus we cannot say that the jury's decision that Haltom's behavior did not constitute "reasonable care" is unsupported.

¶24 Haltom responds that the defense he presented eliminated any possible negligence finding as a matter of law. We disagree. At trial Haltom argued that it was, and is, Dr. John's policy to exclude from the store everyone under the age of eighteen. Under the policy, every patron's identification was checked at the door, so he argues that it was reasonable for him to assume that she was over eighteen when she reached the counter. The State countered that in the few days that the store was operating in Midvale before Haltom's arrest, the officer who eventually arrested Haltom had twice entered the store without being

subjected to the "mandatory" identification check. The State also pointed to BP's presence in the store as evidence that Dr. John's policy was at best sporadically enforced. Thus, the jury was presented with conflicting information concerning Dr. John's policy, and it was left to determine whether the policy alone amounted to "[t]hat degree of care which a person of ordinary prudence would exercise in the same or similar circumstances." Black's Law Dictionary 1265 (6th ed. 1990).

¶25 Even accepting Haltom's argument that a policy could be used to immunize him from prosecution – which is a position we do not necessarily accept – the evidence concerning the application of this policy was conflicting. Consequently, it was the role of the jury to determine whether the policy, and Haltom's claimed reliance upon it, amounted to the reasonable care required by section 76-10-1206. *Cf. Little Am. Ref. Co. v. Leyba,* 641 P.2d 112, 114 (Utah 1982) ("The jury is entrusted to resolve all relevant questions of fact presented to the court. The questions of fact include findings of negligence[.]"). The jury determined that Haltom had been reckless, and by implication that he had violated section 76-10-1206's duty of reasonable care, when he sold the video to BP. Consequently, we conclude that Haltom's conviction was supported by sufficient evidence.

CONCLUSION

¶26 The trial court properly denied Haltom's motion to dismiss the charges because Haltom failed to show that he had been entrapped as a matter of law. The court erred in denying Haltom the opportunity to introduce testimony concerning Vadim's out of court statements, but Haltom

was given the opportunity to present evidence to the jury that was sufficiently similar to the excluded testimony rendering the trial court's error harmless. Finally, a showing of simple negligence is sufficient to support a conviction under section 76-10-1206's expectation of "reasonable care." The jury found that Haltom failed to use reasonable care in selling an adult video to BP and the evidence supports its verdict.

¶27 Accordingly, we affirm Haltom's conviction.

William A. Thorne Jr., Judge

¶28 WE CONCUR:

Judith M. Billings,
Presiding Judge

Russell W. Bench,
Associate Presiding Judge